

STATE OF MICHIGAN
COURT OF APPEALS

JONATHON MOORE,
Plaintiff-Appellee,

UNPUBLISHED
May 4, 2004

v

CITY OF FLINT,
Defendant-Appellant.

No. 245027
Genesee Circuit Court
LC No. 2001-069767-CZ

Before: O’Connell, P.J., and Jansen and Murray, JJ.

JANSEN, J. (*concurring in part and dissenting in part*).

I respectfully dissent with regard to the majority's conclusion that the trial court erred in denying defendant’s motion for summary disposition on plaintiff’s retaliation claim. In all other aspects, I concur with the majority's opinion.

As provided by the majority, to establish a prima facie case of retaliation under the Persons With Disabilities Civil Rights Act (PWDCRA), a plaintiff must prove the following:

"(1) that he engaged in a protected activity; (2) that this was known by the defendant; (3) that the defendant took an . . . action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse . . . action." [*Bachman v Swan Harbour Associates*, 252 Mich App 400, 435; 653 NW2d 415 (2002) quoting *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 436; 566 NW2d 661 (1997).]

In denying defendant’s motion for summary disposition on the retaliation claim, the trial court stated:

[T]he Defendant raises the position - - or raises the point that timing cannot be used exclusively to show the causal connection. But, in this case, I think an argument can be made that it is more than just the timing. I think it is admitted a little bit that there was some tolerance in an effort to work out these issues prior to the filing of the complaint, and, then, subsequent to the filing of the complaint, there were discipline issues not only related to the timing but they were also, arguably, related to the level of tolerance that would be permitted. So it’s more than just that the discipline began after the filing of the EEOC complaint, there is also an issue raised on these facts that there was less tolerance than before, which,

in my view, creates an issue of fact as to whether or not there was a causal connection.

Thus, the trial court held that the evidence showed more than simply a causal connection based upon the timing of the two events. And, the trial court recognized that there was evidence that before plaintiff filed his complaint with the Equal Employment Opportunities Commission (EEOC), defendant was more tolerant of his absences and tardiness because defendant tried to work out a solution. The trial court also observed that there was evidence supporting that after plaintiff filed his complaint with the EEOC, the discipline increased and defendant was less tolerant, which the court concluded was sufficient to create a genuine issue of material fact.

A trial court's decision on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). All reasonable inferences are to be drawn in favor of the nonmovant. *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 259 Mich App 315, 324; 675 NW2d 271 (2004). This Court is liberal in finding a genuine issue of material fact. *Lash v Allstate Ins Co*, 210 Mich App 98, 101; 532 NW2d 869 (1995). A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ. *Allstate Ins Co v State*, 259 Mich App 705, 709-710; 675 NW2d 857 (2003).

The only disputed issue with regard to plaintiff's retaliation claim is whether a causal connection existed between the protected activity and the alleged adverse employment action. Recognizing that this Court is liberal in finding a genuine issue of material fact, upon a review de novo, I agree with the trial court that the evidence in this case was sufficient to create a question of fact on the causal connection element. See *Lash, supra* at 101.

Plaintiff filed a complaint for discrimination with the EEOC on March 8, 2000. Plaintiff claimed that he became a target for disciplinary action shortly after he filed his EEOC complaint. Moreover, plaintiff claimed that after defendant learned of the EEOC complaint, it stopped paying him for hours he worked after 5:00 p.m. Plaintiff submitted a copy of a memorandum sent to Matthew Grady, defendant's finance director, on April 4, 2000, through defendant's legal department, regarding plaintiff's complaint with the EEOC. Therefore, it appears that plaintiff's superiors did not receive notice of that complaint until April 2000, which the evidence suggests was around the same time that the disciplinary action against plaintiff began to significantly increase.

The disciplinary records produced by defendant reveal that plaintiff was disciplined for his absenteeism and tardiness on numerous occasions, dating back to 1992, well before he filed his complaint with the EEOC. In 2000, however, the number of disciplinary actions taken against plaintiff increased substantially, beginning in either April 2000 or May 2000. Most of these disciplinary actions were for failing to inform the supervisor of absences or failing to adhere to the flex-time schedule. When plaintiff was charged with failing to adhere to the flex-

time schedule, he was not paid for those hours he worked beyond his flex-time schedule. This form of discipline was not imposed before 2000.

There was evidence that before 2000, plaintiff was able to work on a flexible schedule to accommodate for days that he was late for work. As noted above, defendant subsequently stopped paying plaintiff for when he worked later hours. This was evidence, as noted by the trial court, that defendant had become less tolerant of plaintiff's condition and was no longer willing to allow him to work a later schedule, after defendant became aware of the complaint filed with the EEOC. The evidence submitted by plaintiff showed that he was subject to substantially more instances of discipline, and more severe discipline, after he filed his complaint with the EEOC. This was evidence sufficient to create a genuine issue of material fact regarding whether defendant was attempting to increase its discipline against plaintiff in retaliation for filing the complaint with the EEOC. In addition, as the trial court noted, defendant was apparently less tolerant of plaintiff's need for accommodation by refusing to pay him when he worked late. This was further indication that plaintiff was being retaliated against for reporting alleged discrimination to the EEOC.

I would conclude, upon a review de novo, that plaintiff established a prima facie case of retaliation. I would further conclude the plaintiff has shown that his participation in the protected activity was a "significant factor" in the employer's adverse employment action. See *Barrett v Kirtland Community College*, 245 Mich App 306, 315; 628 NW2d 63 (2001). I disagree with the majority because, when viewing the evidence submitted in a light most favorable to plaintiff, shortly after plaintiff filed his EEOC claim plaintiff was subject to substantially more disciplinary actions than in the past and defendant stopped paying him for hours he worked after his scheduled work hours. Plaintiff produced evidence to support a causal connection because he produced sufficient evidence of both the timing of the disciplinary action and the increase in discipline to establish a genuine issue of material fact as to whether defendant retaliated against him for filing the EEOC complaint. While "[p]laintiff must show something more than merely a coincidence in time between protected activity and adverse employment action," *West v General Motors Corp*, 469 Mich 177, 186; 665 NW2d 468 (2003), something more than a "temporal connection" exists in the present case as evidence has been presented that goes well beyond timing in that the discipline records and a lack of tolerance all support plaintiff's claim, see *id.* The evidence supporting that defendant became less tolerant of plaintiff's condition only after it became aware of the EEOC complaint was sufficient to raise a genuine issue of material fact as to whether there was a causal connection between defendant's actions and plaintiff's filing of the EEOC complaint.¹

¹ Once a plaintiff establishes a prima facie case of retaliation, the burden of production shifts to the defendant to articulate a legitimate business reason for the adverse employment action. See *Roulston v Tendercare, Inc*, 239 Mich App 270, 280-281; 608 NW2d 525 (2000). Defendant argues that the trial court erroneously failed to consider whether it presented a legitimate, nondiscriminatory reason for disciplining plaintiff after the EEOC complaint was filed. Issues not addressed by the trial court are not properly before this Court. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 513; 667 NW2d 379 (2003). Moreover, defendant only alluded to this
(continued...)

For the above stated reasons, I would affirm the trial court's denial of defendant's motion for summary disposition on plaintiff's retaliation claim, and reverse and remand for entry of summary disposition in favor of defendant on plaintiff's discrimination claim.

/s/ Kathleen Jansen

(...continued)

argument in the last paragraph of its brief in support of its motion for summary disposition, and failed to cite any law in support of its position. A party moving for summary disposition under MCR 2.116(C)(10) "must specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact." MCR 2.116(G)(4). Because defendant did not sufficiently identify this issue as a basis for summary disposition, and it was not considered or addressed by the trial court, it is unnecessary to address the issue on appeal. Defendant is free to raise the issue below in a properly presented motion for summary disposition.